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Nos. 92-515 and 92-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner,*
v.
TODD MITCHELL, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

STATE OF OHIO, *Petitioner,*
v.
DAVID WYANT, et al., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

Brief of *Amicus Curiae* Cook County, Illinois in Support of Petitioners

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INTEREST OF AMICUS CURIAE

The citizens of Cook County, Illinois as amicus curiae have a critical interest in this Court's review of the validity of "hate crimes" statutes which enhance the penalty for crimes committed because of individuals' status within particular groups. In response to a proliferation of such targeted crimes, the Illinois General Assembly has enacted two statutes. One statute creates an offense called a "hate crime" where one commits otherwise criminal acts by reason of the status of others. The other statute adds an

aggravating factor to the Illinois sentencing code where felonies are committed because of such status of the victim. The Cook County State's Attorney's Office created and administers a Hate Crimes Prosecutions Council of prominent community leaders to address the rising problem of hate crimes. Vigorous action is required: statistics for the first eight months of this year show that citizens in the City of Chicago alone have reported hate crimes to the police at a rate of almost one every other day.[1]

The Illinois statutes penalize those who cause not only the harm inherent in the underlying criminal acts but in addition the harm arising from assaulting an entire community whose members are, or fear they will be, singled out for crime. The statutes leave citizens free to express their beliefs about others—no matter how hateful—within the uncensored marketplace of ideas: the statutes reach only those who physically prey on others through criminal acts. The Illinois hate-crime statutes do not target speech or violate the constitutional provisions for freedom of speech. To the contrary, they ensure that individuals cannot, through criminal intimidation, deny entire groups access to the oasis of freedom created by the First Amendment.

The erroneous reasoning of the Wisconsin and Ohio Supreme Courts impedes and may preclude effectuation of the Illinois statutes.[2] This Court's decision in *R.A.V. v.*

[1] According to Chicago Police Department records for January through August 1992, citizens reported 104 hate crimes: 81 by reason of race, 10 by reason of sexual orientation, 8 by reason of religion, and 5 by reason of national origin.

[2] Various state courts have rapidly and inconsistently ruled on the constitutionality of hate-crime statutes. *Compare Dobbins v. Florida*, No. 91-1953, 1992 Fla. App. LEXIS 10062 (Sept. 24, 1992);

(Footnote continued on following page)

City of St. Paul, 112 S. Ct. 2538 (1992), while supportive of the validity of the Illinois laws, is subject to misapplication absent clear elaboration. Defendants charged with hate crimes have begun filing motions to dismiss in the trial courts relying on other states' decisions and misreading of this Court's decision in *R.A.V.*[3] Only immediate review by this Court will avoid delay and chaotic *ad hoc* rulings.

ARGUMENT

REVIEW BY THIS COURT IS ESSENTIAL TO ESTABLISH THAT THE FIRST AMENDMENT DOES NOT APPLY TO STATUTES WHICH PENALIZE THE COMMISSION OF CRIMINAL ACTS BY REASON OF INHERENT OR CORE CHARACTERISTICS OF INDIVIDUALS.

A. The Illinois Hate-Crime Statutes.

Each hate crime is a crime committed against an individual and an assault committed against a larger group. The Illinois hate-crime statute, Ill. Rev. Stat. ch. 38, par.

[2] *continued*

Oregon v. Plowman, No. SC S38328 1992 Ore. LEXIS 158 (Sup. Ct. Aug. 27, 1992) (in banc); *Oregon v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115 (1991); *Oregon v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984); *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (Crim. Ct. 1988) (all upholding various hate-crime statutes under First Amendment) *with State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992); *Wisconsin v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992) (finding hate-crime statutes violative of First Amendment).

[3] The tenuous situation in Cook County is present throughout the State of Illinois, and undoubtedly nationwide. The Cook County State's Attorney is a member of an Association of 102 State's Attorneys in Illinois, all of whom view hate-crimes prosecution as a high priority and share our concern about the jeopardy in which the Illinois statutes presently stand.

12-7.1, applies when certain crimes—such as assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, or mob action[4]—are committed "by reason of" another individual's or other individuals' race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin. The statute creates a separate offense from the underlying offense. A first offense hate crime is a Class A misdemeanor; subsequent offenses are Class 3 felonies.[5] The underlying crimes range in severity from lower to higher than the hate crime, so that while the statute is not *per se* a sentencing enhancer, it can act as one.[6] In addition to the criminal provisions, the hate crime statute creates a private right of civil action. *See* Ill. Rev. Stat. ch. 38, par. 12-7.1(c). A separate statute, Ill. Rev. Stat. ch. 38, par. 1005-5-3.2(a)(10), is an explicit penalty enhancer in felony cases, creating a factor in aggravation (warranting imprisonment or a lengthened term) where "the defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin."

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[4] Effective January 1, 1993, the legislature has amended the underlying offenses to include disorderly conduct and harassment by telephone. P.A. 86-1418, 87-440.

[5] Effective January 1, 1993, a first offense is a Class 4 felony and subsequent offenses are Class 2 felonies. P.A. 86-1418, 87-440.

[6] The hate-crime statute requires the sentencer to impose designated minimum amounts of community service, *see* Ill. Rev. Stat. ch. 38, par. 12-7.1(b), which could optionally be imposed on the underlying convictions, *see* Ill. Rev. Stat. ch. 38, pars. 1005-6-2(b), 1005-6-3(9).

The Wisconsin hate crime statute, Wis. Stat. Ann. sec. 939.645 (West 1982 and Supp.) similarly enhances penalties for any crime defined in the Wisconsin Criminal Code if the offender intentionally selects the victim or owner of property "because of the actor's belief or perception" regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person, even if the actor's belief is incorrect. Finally, the Ohio ethnic intimidation statute, Ohio Rev. Code Ann. sec. 2927.12 (Baldwin 1990), provides special penalties for aggravated menacing, menacing, criminal damaging or endangering, criminal mischief and certain forms of telephone harassment whenever the crime is committed "by reason of" the race, color, religion, or national origin of the victim or group of victims. This provision acts as a penalty enhancer because ethnic intimidation is "an offense of the next higher degree" than that for the predicate offense.

B. The Illinois, Wisconsin, And Ohio Hate-Crime Statutes Differ Fundamentally From The Law Invalidated In *R.A.V. v. St. Paul.*

The Illinois, Wisconsin, and Ohio hate-crime statutes do not concern expression of ideas. They are a wholly different species from the St. Paul, Minnesota ordinance struck down in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), a content-based proscription on speech.

The language of the Illinois statute is about *crime* and its victims: "A person commits hate crime when, by reason of [specified characteristics of another individual], he commits [an underlying offense]." Ill. Rev. Stat. ch. 38, par. 12-7.1(a). The language of the St. Paul ordinance, by contrast, is about *speech* and its effects:

> Whoever places on public or private property a *symbol*, object, *appellation*, *characterization* or *graffiti*

> . . . which one knows or has reasonable grounds to know *arouses anger, alarm or resentment in others* on the basis of race, color, creed, religion or gender commits disorderly conduct . . . .

St. Paul, Minn. Legis. Code Sec. 292.02 (1990) (emphasis added). Beyond the clear language, the Minnesota Supreme Court construed the ordinance as *limited* to a category of *speech*—fighting words. *See R.A.V.*, 112 S. Ct. at 2542.

From this starting point all else in *R.A.V.* follows, without relevance to statutes which do not concern a category of speech. *R.A.V.* holds that the general exclusion of a category of speech like "fighting words" from First Amendment protection does not permit content-based regulation within the category of speech. This holding does not pertain to a statute concerning targeted predicate crimes.

C. No First Amendment Interest Is Implicated By The Illinois, Wisconsin, And Ohio Hate-Crime Statutes.

Unlike in Minnesota, the Illinois, Wisconsin, and Ohio hate crimes statutes do not involve a category of speech, protected or generally unprotected by the First Amendment, or the effect of speech on listeners. Rather, they target longstanding criminal acts unrelated to constitutional provisions for freedom of speech, such as criminal trespass to vehicle and misdemeanor theft, committed because of the status of group members within our society.

The underlying criminal acts are not speech. If committing a crime were considered protected constitutional expression, all law enforcement would be unconstitutional. *Any* criminal act could be said to express some idea, such as frustration, anger, or disrespect. The thief communicates "I want what you have." The First Amendment does not cover criminal conduct under the guise of expression.

While the Illinois and St. Paul laws similarly address acts committed "on the basis of" various characteristics (St. Paul) and "by reason of" various characteristics (Illinois), this aspect played no part in the *R.A.V.* analysis until it was determined that the predicate conduct was a form of speech. As Professor Laurence H. Tribe stated in congressional testimony concerning the proposed federal hate crimes act, "the trigger for enhanced punishment . . . differs completely from the constitutionally problematic trigger for punishment under the St. Paul ordinance struck down by the Supreme Court in the *R.A.V.* case." Statement of Laurence H. Tribe on H.R. 4797, the "Hate Crimes Sentencing Enhancement Act of 1992" at 2.

The targeting of otherwise non-speech *crime* committed "by reason of" the status of the victim does not transform crime into speech, nor does it prefer expression of certain *ideas* over others. Rather, it recognizes the greater harm done by criminals who physically select and victimize those with the specified characteristics. The bigot can shoot verbal arrows freely so long as the arrows do not take the form of predicate crimes. The statute punishes particularly harmful crime, not particularly disfavored speech.

D. Greater Harms Deserve Greater Penalties.

Hate crime statutes in Illinois, Wisconsin, and Ohio punish the greater harm caused to the victim, the group, and society as a whole than where a victim is selected randomly or based on private relationships. Because the crime is more harmful, there is a rational basis for legislation of separate or greater punishment.

Hate crimes subject particular victims to the humiliation of knowing that they have been selected because of

immutable or core characteristics. Beyond the individual victim, hate crimes intimidate an entire community left to feel vulnerable and fearful. The implication to each member of the community is that he or she may be the next victim. This often causes criminal acts to "escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases." *Oregon v. Beebe*, 67 Or. App. 738, 680 P.2d 11, 13 (1984). Ultimately, hate crimes damage the fabric of our entire society as they attempt to unravel the opportunities of group members to participate freely in the greater community.

Crimes causing greater harms warrant greater penalties. Specifically, there is nothing novel about increasing punishment for crimes that are particularly harmful because of the status of the victim. Illinois statutes criminalize or increase the classification of certain crimes committed against members of groups such as children or the elderly, *see e.g.* Ill. Rev. Stat. ch. 38, pars. 12-4.3 and 4.6 (aggravated battery of a child or elderly person); Ill. Rev. Stat. ch. 38, pars. 12-14(a)(5) and (b) (aggravated criminal sexual assault of elderly person or minor); disabled individuals, *see e.g.*, *id.* par. 12-14(a)(6) (aggravated criminal sexual assault of a physically handicapped person); Ill. Rev. Stat. ch. 38, par. 65-1 (denial of use of public accommodations to blind persons); and police officers, *see e.g.* Ill. Rev. Stat. ch. 38, par. 9-1(b)(1) (murder of police officer is aggravating factor). Moreover, the Illinois sentencing code permits enhanced penalties where a crime victim is over sixty years old, *see* Ill. Rev. Stat. ch. 38, par. 1005-5-3.2(8), or handicapped, *see id.* at par. 1005-5.3.2(9). These crimes and increased penalties properly reflect the degree of harm done to society when a criminal preys on members of particular groups.

Illinois has a legitimate interest in securing the rights of all people to participate in a tolerant society; to exchange beliefs and ideas, live where they like, school their children where they choose, work where their talents lead them, and generally live free from fear of criminal retaliation because of their inherent or core characteristics. As this Court wrote in *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941):

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuse. The authority of a municipality to impose regulations in order to assure the safety . . . of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

Targeted criminal acts have no place in the marketplace of ideas; indeed, they prevent it from serving as a forum open to all.

E. The Hate-Crime Statutes Do Not Punish Motive.

It is a fallacy to assume that hate crimes statutes punish motive. The "by reason of" language of the Illinois statute does not punish motive. The statute is not concerned with what prompts an offender to target a group member as a crime victim. A person could not be prosecuted for having bigoted *thoughts*, even thoughts about victimizing someone within a certain group. Rather, the statute operates when an offender acts upon such thoughts and commits a crime.

The language of the statute could just as well prohibit the commission of the predicate crimes against a member

of the specified groups "with the intent to commit the crime against a member of such group." Given that this wording would achieve the full objective of the statute, it is clear that motive is not at issue. Intentional physical selection of vulnerable victims is.

The Wisconsin statute is indeed worded in terms of intent. Yet the Wisconsin Supreme Court assumed that the legislature's concern was motive, not intent. *See Wisconsin v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807, 812 (1992). This assumption reflects the erroneous belief of the court that the only difference between the underlying crimes and the hate crime is the motive or reason for commission of the former. *See id.* at 812-13. In fact, the real difference is the targeted assault based on group status. The Wisconsin court could not be more wrong in concluding that the hate crime statute enhances punishment for individuals "because they are bigoted." *Id.* at 814. The bigot is free to think or say what he or she will about others. Each of us must accept the right of others to say what they think. Choosing an individual for crime victimization, however, is no longer a thought or expression but an act. A person need not live in fear of crime because of some characteristics shared by a larger group. "No person is subject to punishment under the [Oregon] Intimidation Law merely for holding or expressing opinions that are inimical to others because of their race, color, religion, national origin or sexual orientation. The focus of the statute is to forbid a result: physical injury." *Oregon v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115, 1119 (1991).

The thought process inherent in intentional selection of a victim is not protected speech. Virtually the entire Illinois criminal code, as in other jurisdictions, relies on proof of intent (indeed, this element of proof operates for the

protection of those who commit acts without *mens rea*). With specific intent crimes, the State must prove that an individual does an act with a further object.[7] Under each of these statutes, the State must prove beyond a reasonable doubt the thought process of the offender in committing one act with a further purpose in mind. Similarly, when one intentionally commits a predicate crime against a particularly vulnerable victim, regardless of the motivation, the State can prosecute accordingly.

F. Penalizing Criminal Motivation Does Not Penalize Expression.

Even if hate-crime statutes were concerned with motive, the First Amendment does not protect motives for the commission of crimes. Judges routinely consider motives in determining appropriate sentences. It would offend our sense of justice to think that severity of sentences could not reflect the difference between benign and malevolent motives. A sentence should reflect, for instance, the difference between crimes committed out of need and greed. Motive is relevant to the offender's culpability and rehabilitative potential.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), this Court determined

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[7] Examples include burglary, Ill. Rev. Stat. ch. 38, par. 19-1 (entering with intent to commit a felony); forgery, Ill. Rev. Stat. ch. 38, par. 17-3 (making a document with intent to defraud); obstruction of justice, Ill. Rev. Stat. ch. 38, par. 31-4 (committing various acts with intent to prevent apprehension or obstruct prosecution); solicitation, Ill. Rev. Stat. ch. 38, par. 8-1 (encouraging another with intent that an offense be committed); conspiracy, Ill. Rev. Stat. ch. 38, par. 8-2 (agreeing with another with intent that offense be committed); and arson for fraud, Ill. Rev. Stat. ch. 38, par. 20-1(b) (damaging property with intent to defraud insurer).

that motivation such as racial hatred is appropriate sentencing aggravation where relevant to commission of the crime. *Dawson* and *Barclay* dispose of the claim that the First Amendment protects criminal motives, even with regard to matters such as race. The Wisconsin Court proves as much by nonsensically conceding that "of course" it is proper as in *Dawson* to consider evil motives in punishing, while claiming that it is different and improper to create a "separate enhancer" for the same evil motive. *See Mitchell*, 485 N.W.2d at 815 n.17. Since the Constitution is not offended when judges consider motive, it cannot be offended by legislation of the same consideration.

G. The Hate-Crime Statute Is Only A Legitimate Extension Of Anti-Discrimination Laws.

The numerous criminal and civil anti-discrimination statutes in Illinois, as in federal law, are precisely analogous to the hate crime statutes in prohibiting actions committed "because of" characteristics of the victim where such targeted actions cause particularly undesirable harms.[8] The acts underlying federal and state anti-discrimination laws, such as hiring and firing, are not inherently objectionable or discriminatory. What is sanctioned is the selection of a particular individual because of group status. In disparate treatment law, employers are free to perform these acts with impunity *absent discriminatory motive.* Disparate treatment is unlawful for precisely the reason that hate crimes are: the selection of a target from within a protected class. The cases identify *motive* as the issue. " 'Under the *disparate treatment* theory, proof of a discriminatory motive is critical. . . .' (*International Brotherhood of Teamsters v. United States* (1977), 431 U.S. 324, 335 n.15. . . .)" *Clyde v. Human Rights Commission*, 206 Ill. App. 3d 283, 564 N.E.2d 265, 269 (1990).[9] Just as targeting of victims properly transforms lawful acts into prohibited acts, so it transforms lesser crimes into greater crimes. Reversal in this case will remove the cloud unnecessarily hanging over all anti-discrimination laws.

[8] Illinois laws prohibit "unlawful discrimination," defined as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service," Ill. Rev. Stat. ch. 68, par. 1-103(Q), in areas such as employment, *see id.* par. 2-102; real estate transactions, *id.* par. 3-102; financial institution loans, *see id.* par. 4-102; issuance of credit cards, *see id.* par. 4-103; and denial of enjoyment of public accommodations, *see id.* par. 5-102. Criminal sanctions apply to certain unlawful discrimination such as in the sale and purchase of real estate, *see* Ill. Rev. Stat. ch. 38, par. 70-51, and the interference with participation in educational activities of a child afflicted with a chronic infectious disease, *see* Ill. Rev. Stat. ch. 38, par. 12-7.2.

H. Freedom Of Speech Does Not Preclude Use Of Speech As Evidence Of Crime.

Use of an offender's words or associations as evidence of guilt is not only constitutional but a principal means of obtaining convictions in many criminal trials. This Court should review this case to correct the alarming misimpression that any resulting "chilling effect" creates a constitutional barrier to use of speech as evidence.

This Court in *Dawson* found that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected

[9] Illinois anti-discrimination law follows the law applicable to federal claims under Title VII. *See Board of Trustees v. Knight*, 163 Ill. App. 3d 289, 294, 516 N.E.2d 991 (1987).

by the First Amendment." 112 S. Ct. at 1097. Where a crime is one of racial hatred, such evidence is relevant aggravation. *See id.* at 1098-99.

The rules of evidence allow the use of a defendant's relevant statements before, during, or after commission of a crime as proof of any element of the crime. "I hate Joe and want to kill him," "This is the end, Joe," and "I confess I killed Joe" are classic evidentiary components. If the First Amendment prohibited use of a person's speech as evidence, the Fifth Amendment's more narrow preclusion of compelled self-incrimination would be superfluous. There is no basis for reading the First Amendment as a prohibition on self-incrimination uncompelled by the State.

CONCLUSION

The decisions of the Wisconsin and Ohio Supreme Courts are wrong on their own terms and in their potential application to hate-crime statutes like that in Illinois. Furthermore, if uncorrected, the erroneous reasoning of the decisions will support time-consuming, unwarranted attacks on much of the criminal code and rules of evidence in criminal proceedings and the entire body of anti-discrimination laws. To demonstrate the limited scope of this Court's ruling in *R.A.V.*, and to curtail the piecemeal challenges sure to come based on these state court decisions, the People of Cook County, Illinois respectfully ask this Court to grant certiorari and reverse the judgments in these cases.

Respectfully submitted,

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